No. 87-250 (3)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

Supreme Court, U.S.
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MANUEL L. REAL, CHIEF JUDGE, UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA,

Petitioner,

vs.

STEPHEN YAGMAN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Where the Court of Appeals reversed the District Court's imposition of a $250,000 sanctions award against plaintiffs' attorney as "massive" and "not sound" in amount and as unauthorized by the statute and rules invoked by the District Court, remanded the case for reconsideration whether any sanctions were warranted under a proper exercise of sanctioning authority, and directed that on remand the case be reassigned to a new, randomly selected judge because this was necessary under the "unusual circumstances" of the case to preserve the appearance of justice, did the Court of Appeals, in directing this random reassignment, exceed the jurisdiction and power it possesses over appeals under 28 U.S.C. 2106, under the All Writs Act, 28 U.S.C. 1651(a), and in the exercise of its inherent supervisory authority.

TABLE OF CONTENTS

	Page
Ouestion Presented	i
Table of Authorities	ii
Statement of The Case	1
Argument	12
Conclusion	17

TABLE OF AUTHORITIES

Brown v. Baden, 815 F.2d 575 (9th Cir. 1987), 9,10,11

Calvaresi v. United States, 348 U.S. 961 (1955), 14

Chandler v. Judicial Council of the Tenth Circuit, 398 U.S. 74 (1970), 16

In Re Real, 107 S.Ct. 604 (1986), 7

Matter of Yagman, 796 F.2d 1165 (9th Cir. 1986) rehearing denied, 803 F.2d 1085 (9th Cir. 1986), 3,4,5, 6

	Page
Thermtron Products, Inc. v. Hermansdorfer, 423 U.S. 336 (1976),	16
United States v. Baylin, 696 F.2d 1030, 1043 n. 30 (3rd Cir. 1982),	13
United States v. Ritter, 273 F.2d 30, 32 (10th Cir. 1959), cert denied, 362 U.S. 950 (1960),	13
United States v. Robin, 553 F.2d 8, 9 (2nd Cir. 1977),	12,14
United States v. Sears, Roebuck & Co., 785 F.2d 777 (9th Cir.), cert denied, 107 S.Ct. 93 (1986),	6,13,14

Statutes and Rules

Title 28, U.S.C.	
144	8,12
332 (d)(3)	16
445	7,12
1651 (a), All Writs Act	i,12
1927	2,4
2106	i,12
Rule 11, F.R.Civ.P.	3,4
Central District of California Local Rule 27.1	3,4

SUPREME COURT OF THE UNTED STATES

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vs.

STEPHEN YAGMAN,

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BRIEF FOR RESPONDENT IN OPPOSITION

STATEMENT OF THE CASE

This petition arose as a result of a civil diversity case in the Central District of California in which plaintiffs Jerry Brown and Gerry Fleischer sued defendants Sidney Weinberg and Michael Baden for defamation. Respondent herein, Stephen Yagman ("Yagman"), and his husband and wife law firm, Yagman &

Yagman, P.C., represented the plaintiffs.

The complaint was filed on July 1, 1982 and assigned to the Honorable Lawrence T. Lydick. By the trial date Judge Lydick had considered more than 250 separate pleadings and denied four separate motions for summary judgment filed by defendants. The case was reassigned on the eve of trial, March 14, 1984, without notice to plaintiffs, to petitioner herein, the Honorable Manuel L. Real, Chief Judge of the Central District of California.

After directing a verdict in defendants' favor at the close of plaintiffs' case, Judge Real suggested to defendants that they make a motion for sanctions. When defendants made the motion, Judge Real, on June 20, 1984, imposed sanctions on Yagman and his firm in the amount of $250,000, the full amount requested by defendants. (App. 60a-74a).*

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* Citations to "App." are to the Appendix to the petition for a writ of certiorari herein.

Judge Real based the sanctions on Rule 11, F.R.Civ.P., 28 U.S.C. 1927, and Central District Local Rule 27.1. He based the dollar amount on claimed attorneys' fees of more than $293,000 and other expenses allegedly incurred by the defendants.

Yagman appealed. In Matter of Yagman, 796 F.2d 1165 (9th Cir. 1986), App. 12a-55a, the Court of Appeals restated the rule that sanctions must be reasonable and rejected the district court's devastating sanctions as not complying with this rule. Matter of Yagman, supra, 796 F.2d at 1184, App. 46a-47a. The Court noted that Judge Real had made "no attempt to itemize and quantify the sanctions." Matter of Yagman, supra, 796 F.2d at 1185, App. 48a. Nor had the district court made any attempt "to scrutinize the $293,000 in fees and expenses that defendants claim to have incurred in fighting a lawsuit which they contend was frivolous from the start." Id. In addition,

the district court had failed to consider any misconduct on the part of defense counsel and had failed to take into account Yagman's ability to pay "such an immense sum." Id., App. 49a.

The Court of Appeals concluded that "the district court does not appear to have determined in any way whether the sanctions award complies with the reasonableness requirement." Id. To allow such a "massive" sanctions award to stand, the Court ruled, "would send shivers through the bar." Id. The Court also held that Judge Real had erred in applying Rule 11, F.R.Civ.P., 28 U.S.C. 1927 and Local Rule 27.1 in imposing sanctions. Id. at 1185-7, App. 49a-54a. The Court reversed the sanctions award and remanded.

The Court's remand was accompanied by the specific instruction "that this case be randomly reassigned" to a new district judge. Id. at 1188, App. 55a. The Court acknowledged that it was "hesitant to grant

this extraordinary relief" but stated that it was compelled to do so "to preserve the appearance of justice." As the Court observed in a spirit of moderation, "... the fragile appearance of justice has taken a beating." The Court added in its opinion which was rendered on August 13, 1986,

> "It is time to conclude the matter as quickly and as painlessly as possible. We feel this can best be accomplished by a new, randomly selected judge."

Id.

Judge Real did not cause the case to be randomly reassigned. Instead, after the decision he scheduled five separate court dates, September 19, 1986, October 20, 1986, November 17, 1986, January 5, 1987 and January 12, 1987, each with an in terrorem quality caused by uncertainty as to his purpose.

Appellees in the underlying civil case, Michael Baden and Sidney Weinberg, filed a petition for rehearing accompanied by a suggestion of appropriateness of rehearing en

banc. The petition specifically took issue with the Court of Appeals' determination that the case be randomly reassigned. By order dated November 6, 1986, the panel denied the petition and rejected the suggestion for rehearing en banc, noting that no judge of the full court had requested a vote on the suggestion for en banc rehearing. Matter of Yagman, 803 F.2d 1085 (9th Cir. 1986), App. 58a-59a.

At the hearing before Judge Real on November 17, 1986, for the stated purpose of spreading the judgment of the Court of Appeals on the record of the district court, Judge Real continued the hearing until January 1987 to await the decision of the Supreme Court on Judge Real's own petition for a writ of mandamus following the Court of Appeals' decision in United States v. Sears, Roebuck & Co., 785 F.2d 777 (9th Cir.), cert denied, 107 S.Ct. 93 (1986). The Court of Appeals' opinion in Sears had ordered that

case reassigned on remand from Judge Real to another district judge. Judge Real's petition challenged the power and authority of the Court of Appeals to order that reassignment. On December 1, 1986, the Supreme Court denied without opinion Judge Real's petition for mandamus, thus letting the reassignment order stand. In Re Real, 107 S.Ct. 604 (1986).

On January 12, 1987, Judge Real did not reassign the case randomly to another district judge as directed by the Court of Appeals' order, App. 56a-57a. Instead, he retained the case and filed and served on the parties a document styled "Order to Show Cause". App. 8a-9a. This Order to Show Cause directed the parties to file briefs addressing the Court of Appeals' authority to reassign the case. The order mandated that each party's brief address 11 stated issues, including the constitutional or statutory authority of the Court of Appeals in the assignment of cases in the district court;

whether 28 U.S.C. Sections 144 and 445 provide the exclusive method for reassignment of cases; and whether a district court was entitled to notice and a hearing before recusal from a case by the Court of Appeals. The issues he ordered the parties to brief included the precise issues he had briefed and presented as a litigant to the Supreme Court in his petition for a writ of mandamus in Sears several months earlier. Thus, instead of obeying a direct order of a higher court to cause the case to be randomly reassigned, Judge Real ordered the parties to submit briefs on the lawfulness of the higher court's order, though only a month before the Supreme Court had declined to review those very issues raised by him as a litigant.

Faced with this prospect, Yagman immediately filed a notice of appeal from the January 12 order accompanied by an emergency motion for a stay of the order. By order filed January 28, 1987, App. 10a-11a, the

Court of Appeals construed the appeal and the motion as a petition for a writ of mandamus to compel compliance with the Court's prior order of reassigment. The Court ordered responses to the petition to be filed within 21 days. Further proceedings in the district court were stayed pending a decision on the petition. Judge Real, through counsel, subsequently filed an opposition to the petition, as did appellees Weinberg and Baden.

On April 22, 1987, the Court of Appeals granted the writ of mandamus, directing enforcement of its previous order that the case be randomly reassigned. Brown v. Baden, 815 F.2d 575 (9th Cir. 1987), App. 1a-4a. The Court stated that there was "no doubt" as to its authority to reassign a case. Brown v. Baden, supra, 815 F.2d at 576, App. 3a. The Court observed that anarchy would prevail if a lower court did not follow decisions and mandates of a higher court. Id. The Court also cited the "long line of

cases" permitting a court of appeals to reassign cases in the exercise of the court's "inherent power to administer the system of appeals and remands." Id., App. 4a.

The Court then vacated Judge Real's Order to Show Cause, granted Yagman's petition and directed the clerk of the district court to randomly select another judge for the case in accordance with court rules. Id. at 577, App. 4a.

In a subsequent order filed June 26, 1987, Brown v. Baden, supra, 815 F.2d at 577, App. 5a-6a, the Court amended its earlier decision "to relieve the clerk of the district court of any obligation to randomly select another district judge for this case", ordering instead that the obligation to reassign the case "shall remain with Chief Judge Real as previously ordered." Brown v. Baden, supra, App. 6a.

The June 26 order also noted that Yagman had previously applied to have Judge Real

held in contempt for failure to reassign the case as directed by the Court almost a year earlier. The Court stated in this regard:

> "That application is hereby dismissed as premature in that Chief Judge Real has not exhausted the judicial remedies available to him and he may yet comply with this court's reassignment order and thereby purge himself of possible contempt."

Id., App. 6a.

Judge Real has now petitioned this Court for a writ of certiorari to review the Court of Appeals' decision granting the writ of mandamus requiring Judge Real to follow the Court's earlier order and reassign the case. Alternately, Judge Real seeks a writ of mandamus or prohibition directing the Court of Appeals to reverse its order of reassignment, Petition p.1. For the reasons set forth below, this petition should be denied.

ARGUMENT

Judge Real's primary argument as set forth in his petition is that an appellate court simply has no authority to order reassignment of a case "apart from circumstances justifying disqualification under Title 28 U.S.C. Sections 144 and 455." Petition p. 8. However, no case known to respondent, including the cases cited by Judge Real, has ever held, commented in passing or implied that an appellate court's reassignment power is so limited. All courts of appeal which have considered the matter have ruled that such reassignment power exists.

The courts have articulated different sources for the power to reassign cases in the absence of bias. Some courts rely on the general remand authority contained in 28 U.S.C. 2106. E.g., United States v. Robin, 553 F.2d 8, 9 (2nd Cir. 1977). Other courts have cited the All Writs Act, 28 U.S.C. 1651(a). E.g., United States v. Ritter, 273

F.2d 30, 32 (10th Cir. 1959), cert denied, 362 U.S. 950 (1960). Still other courts have found the reassignment power to be part of the court's inherent supervisory power. United States v. Baylin, 696 F.2d 1030, 1043 n. 30 (3rd Cir. 1982). The Ninth Circuit has found the power to reassign cases from all three sources. United States v. Sears, Roebuck & Co., Inc., supra, 785 F.2d at 779.

What the courts in all these cases are saying -- with one voice -- is that an appellate court's power to order reassignment of a particular case to a different trial judge is a necessary concomitant of appellate jurisdiction, inferable from the wording of the statutes governing appellate jurisdicion, necessary to the very existence of the appellate system itself. The power is so basic that, as Judge Real notes in his petition, some courts invoke it without discussion of its legal derivation. Indeed, the Supreme Court did just that in Calvaresi

v. United States, 348 U.S. 961 (1955), where the Court remanded a case "for retrial before a different judge," saying only that it was doing so "[i]n the interests of justice and in the exercise of the supervisory powers of this Court."

The relief is extraordinary and appellate courts ought to be, as the Court of Appeals here was, "hesitant to grant" it. App. 55a. For this reason the circuit courts have carefully established standards for determining when an order of reassignment is appropriate. In two leading cases, the Second Circuit and the Ninth Circuit have ruled that remand to a new judge is to be ordered only under "unusual circumstances." United States v. Sears, Roebuck & Co., inc., Supra, 785 F.2d at 780; United States v. Robin, supra, 553 F.2d at 10. Both courts evaluate the same three factors in determining whether reassignment is appropriate. Id.

Thus, Judge Real is wrong in stating in

his petition that there is no clear rule of law applicable to his conduct. Petition at pp. 7-11. The courts of appeals have spoken with remarkable unanimity and consistency. His tenacious attempt to retain jurisdiction in this case, delaying resolution of the issues which threaten the career of a zealous civil rights advocate for over a year, itself damages the fragile appearance of justice and requires reassignment.

There is a clear appellate power of reassignment on these facts with Judge Real's conduct falling within clear standards for its exercise. The power has been invoked infrequently and exercised prudently over the years. The facts in this case, where the draconian sanctions imposed would destroy most members of the bar, falls clearly within such standards.

If there remain areas of uncertainty either as to appellate courts' power of trial assignments, see, Chandler v. Judicial

Council of the Tenth Circuit, 398 U.S. 74 (1970), or as to the relative advisability of addressing judicial intransigence by direct, case-by-case review or by proceedings of the Judicial Council of the Circuit, see, Thermtron Products v. Hermansdorfer, 423 U.S. 336 (1976) (repeated unauthorized remand to state court of properly removed cases), see also, 28 U.S.C. 332(d)(3) ("Unless an impediment to the administration of justice is involved, regular business of the courts need not be referred to the council.") they must be addressed another day in other cases. There is no need for this Court to review this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

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